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The Contemptuous Attorney and Problems Concerning His Summary Punishment under Rule 42(a) of the Federal Rules of Criminal Procedure , 4 J. Marshall J. of Prac. & Proc. 74 (1970)

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THE CONTEMPTUOUS ATTORNEY AND PROBLEMS CONCERNING HIS SUMMARY PUNISHMENT UNDER RULE 42(a) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

The contempt sentences imposed upon defense counsel in the "Conspiracy Seven" Trial[1] have awakened a new interest in the contempt proceeding, especially as it applies to attorneys. The proceeding is said to be sui generis;[2] some describe it as an anomaly in the law.[3] Indeed, it is an offense created by the courts[4] and recognized by many as an inherent power needed for protection of the judicial system.[5] Recognition of the power in the United States was given by Congress in the Judiciary Act of 1789 which created the federal courts.[6] Forty-two years later Congress recognized a need for restrictions on the power with the passage of an act limiting its use.[7]

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[1] United States v. Dellinger, No. 69 CR 180 (N.D. Ill., filed Feb. 15, 1970), *appeal docketed*, No. 1-8294, 7th Cir., Feb. 26, 1970, includes the contempt citations against both Leonard Weinglass and William Kunstler as well as against all the defendants in the case. Weinglass was found guilty of 14 separate acts of contempt and Kunstler was found guilty of 24 separate acts.

[2] Myers v. United States, 264 U.S. 95 (1923); See note 10 *infra* for a statement of the significance of this classification.

[3] Mr. Justice Black so stated in his dissent in Green v. United States, 356 U.S. 165, 193-94 (1958); Mr. Justice Douglas concurred in the dissent which stated in part:

> The power of a judge to inflict punishment for criminal contempt by means of a summary proceeding stands as an anomaly in the law. In my judgment the time has come for a fundamental and searching reconsideration of the validity of this power which has aptly been characterized by a State Supreme Court as, "perhaps, nearest akin to despotic power of any power existing under our form of government." . . . [I]t has become a drastic and pervasive mode of administering criminal justice usurping our regular constitutional methods of trying those charged with offenses against society.

The Court refers in its above quote to State *ex rel.* Ashbaugh v. Circuit Court, 97 Wis. 1, 8, 72 N.W. 193, 194-5 (1897).

[4] See text discussion at note 101 *infra*. This contempt power has been extended to other agencies because of their investigative powers: *e.g.*, grand juries, *see* Brown v. United States, 359 U.S. 41 (1959); Congressional Committees, *see* McPhaul v. United States, 364 U.S. 372 (1960).

Some states have bestowed this power upon administrative agencies, *e.g.*, *Ex parte* Sanford, 236 Mo. 665, 139 S.W. 376 (1911) which recognizes the grant to a county board and *In re* Hayes, 200 N.C. 133, 156 S.E. 791 (1931) which recognizes the power in an industrial commission.

[5] The contempt power is felt to be an inherent power necessary to preserve the authority of the court and to prevent the administration of justice from falling into dispute. Fisher v. Pace, 336 U.S. 155 (1948). The power is an essential incident to maintenance of the court's authority and administration and execution of its orders, People v. Loughran, 2 Ill. 2d 258, 118 N.E.2d 310 (1954). See note 107 *supra*.

[6] Judiciary Act of 1789, ch. 20, §17, 1 Stat. 83 states:

> . . . That all the said courts of the United States shall have power to . . . punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same. . . .

[7] See text at note 36 *infra* and note 37 *infra*.

A study of the case law brings to the fore several interesting and perplexing issues, particularly concerning the procedures employed in the punishment of contempt, especially the kind exhibited in the "Conspiracy Trial." This class of contempt is punishable summarily, that is, without notice, hearing, or jury trial.[8]

After a brief discussion of the different types of contempts, this comment will deal with the following topics: the type of courtroom behavior on the part of counsel which has been found to be criminally contemptuous and thus subject to summary punishment; the nature of the summary procedure for punishment of direct criminal contempt; the history and rationale behind the power; and the procedural safeguards which exist to protect the contemnor against unreasonable use of this power and their application in the courts.

Contempts are generally classified as civil or criminal.[9] The procedural and substantive rights accorded civil and criminal contemnors differ distinctly,[10] thus there is an imperative need

[8] FED. R. CRIM. P. 42(a) which deals with direct, criminal contempt provides that if the contempt occurs in the presence of the judge, it can be punished summarily, *i.e.*, without notice, hearing or opportunity to defend. See text discussion at note 82 *infra*.

[9] Under historical English equity procedures, the parallel classification was "ordinary-extraordinary" rather than criminal-civil contempt. United States v. Anonymous, 21 F. 761, 767 (Tenn. Cir. 1884).

[10] A criminal contempt carries with it many of the aspects of a standard criminal prosecution. A criminal contempt sentence is pardonable. *Ex parte* Grossman, 267 U.S. 87 (1925); *Ex parte* Magee, 31 N.M. 276, 242 P. 332 (1925); *Contra*, State v. Shumaker, 200 Ind. 716, 164 N.E. 408 (1928). A civil contempt sentence is not. R. GOLDFARB, THE CONTEMPT POWER, 48 (1963).

A criminal contempt has a six month limitation on the length of imprisonment without trial. Bloom v. Illinois, 391 U.S. 194 (1968), see text discussion at note 109 *infra*. A civil contempt has no such limitation. If a contempt consists of disobedience to a court order, the contemnor may be imprisoned until he complies, which may be for an indefinite time period. Reeder v. Morton-Gregson Co., 296 F. 785 (8th Cir. 1924). A criminal contempt must be for a definite time period. State *ex rel.* Grebstein v. Lehman, 100 Fla. 481, 129 So. 818 (1930). This procedure has been upheld on the grounds that the contemnor "holds the keys to his own prison." Reeder v. Morton-Gregson, *supra; Bloom, supra*. This procedure has been criticized because the incarceration for failure to act is as much a punishment as a coercion. GOLDFARB, *supra*.

The criminal contemnor can assert the privilege against self-incrimination. Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911); Root v. McDonald, 260 Mass. 344, 157 N.E.2d 684 (1927); People v. Spain, 307 Ill. 283, 138 N.E. 614 (1923). The civil contemnor cannot assert this privilege. State v. Treon, 188 N.E.2d 308 (Ohio App. 1963). In a criminal contempt proceeding, the burden of proof is the same as in an ordinary criminal prosecution, *i.e.*, beyond a reasonable doubt. Nilva v. United States, 352 U.S. 385 (1957); Root v. MacDonald, *supra*. In civil contempt, clear and convincing evidence, something beyond a preponderance but something less than the reasonable doubt test is required. Oriel v. Russell, 278 U.S. 358, 364 (1928).

A criminal contempt sentence is final and appealable by the contemnor. Union Tool Co. v. Wilson, 249 F. 736 (9th Cir. 1918), *cert. denied*, 248 U.S. 559 (1918). It can also be appealed by the government. United States v. Hoffman, 161 F.2d 881 (D.C. Cir. 1947) which was appealed by the prosecu-

to distinguish between the two. Drawing the line, however, has met with much difficulty.[11]

One attempt to formulate a cogent method of distinction is the "purpose of the punishment" test enunciated in *Gompers v. Bucks Stove & Range Co.*[12] The test states that if the punishment is remedial and is intended to serve the purposes of the complainant, the contempt is civil.[13] If the punishment is puni-

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tion in 336 U.S. 77 (1948). However, a judgment of guilt is not a felony conviction. United States v. Galante, 298 F.2d 72 (2d Cir. 1962) *rev'd on other grounds*, 335 U.S. 77 (1948).

Compulsion and compensation are proper remedies in a civil contempt case but not in a criminal case. State *ex rel.* Grebstein v. Lehman, *supra.*

Meyers v. United States, 264 U.S. 95 (1923) suggests that by classifying the contempt proceeding as "sui generis," the court can examine the overall characteristics of each individual case and proceed to classify it accordingly.

[11] *E.g.*, Penfield v. S.E.C., 330 U.S. 585 (1947) wherein the act of contempt was the failure to provide documents to the S.E.C. The district court found the contempt to be criminal but the court of appeals found it to be civil. The Supreme Court affirmed the civil classification holding that there was a dual purpose in civil contempts, *i.e.*, to vindicate the public interest and to compel and coerce conduct. See the discussion of Ohio v. Local 5760, USW, 172 Ohio St. 75, 173 N.E.2d 331 (1961) at note 31 *infra.* The line distinguishing between the two has been characterized as shadowy and obscure. United States v. UMW, 330 U.S. 258 (1946).

[12] 221 U.S. 418, 441 (1911).

See Note, 46 YALE L.J. 326 (1936) which discusses the following alternate tests for determining between civil and criminal contempt:

1. The method of initiating prosecution. Wakefield v. Housel, 288 F. 712 (8th Cir. 1923); Denny v. State, 203 Ind. 682, 182 N.E. 313 (1932).

2. The nature of the order violated with emphasis upon whether the status quo could be re-established or upon the positive or negative wording of the order. Reeder v. Morton-Gregson Co., 296 F. 785 (8th Cir. 1924); Lester v. People, 150 Ill. 408, 37 N.E. 1004 (1890); State v. Knight, 3 S.D. 509, 54 N.W. 412 (1893).

3. Whether or not the contemnor was a party to the original suit. Bessette v. Conkey, 194 U.S. 324 (1903); Hammond Lumber Co. v. Sailors' Union, 167 F. 809 (C.C.N.D. Cal. 1909). *Contra,* O'Brien v. People, 216 Ill. 354, 75 N.E. 108 (1905).

Courts have discussed the following formalities in distinguishing between civil and criminal contempt:

1. The title of the proceeding. *Wakefield, supra.*

2. The nature of the relief sought. Lamb v. Crammer, 285 U.S. 217 (1932).

3. Whether the contemnor did or did not testify. Mitchell v. Dexter, 244 F. 926 (1st Cir. 1917); *Wakefield, supra.*

4. The identity of the prosecutor. *In re* Guzzardi, 74 F.2d 671 (2d Cir. 1935); *In re* Kahn, 204 F. 581 (2d Cir. 1913).

[13] In Bessette v. Conkey, 194 U.S. 324 (1903), the Court recognized this classification for the first time in order to define the correct procedure for punishment of the contemnor who had violated an injunction. Previously, contempt had been reviewable only on writs of certiorari or prohibition, questioning the lower court's jurisdiction. The Supreme Court, in stating that contempt was within its appellate jurisdiction, held contempt to be a crime and impliedly adopted the lower court's classification. Formerly, no court reviewed the contempt proceeding of another. *Ex parte* Kearney, 20 U.S. (7 Wheat.) 37 (1822). For a more recent case in accord, see State *ex rel.* Grebstein v. Lehman, 100 Fla. 481, 129 So. 818 (1930). Now, however, most contempts are reviewable on a writ of error. Brimson v. State, 63 Ohio 347, 58 N.E. 803 (1900). Civil contempt, however, is generally reviewable by appeal. Lamb v. Crammer, 285 U.S. 217 (1932); Vilter Mfg. Co. v. Humphrey, 132 Wis. 587, 112 N.W. 1095 (1907).

tive in nature, designed to vindicate an affront to the authority of the court, the contempt is criminal.[14]

The "purpose of the punishment" test, which is most frequently applied, has been criticized because the character and purpose of the punishment is determinative of the nature of the act. Therefore, there can be no expectation before the decision of punishment of what that determination will be. The determination thus is a subjective matter left with the decision maker and does not adequately inform the potential contemnor of which class of acts are prohibited and therefore what his duties and liabilities are.[15] In *McCann v. New York Stock Exchange*,[16] Judge Learned Hand stated that this classification technique had defeated its own purposes by failing to advise the defendant at the outset of the nature of the case against him. In response to this case, the Federal Rules of Criminal Procedure were amended to include a requirement of notice and hearing in certain cases.[17] The clarity of this provision was blurred by *United States v. United Mine Workers*[18] which held that the same act can be classified as both criminal and civil contempt notwithstanding the fact that procedural protections are likely to become obscured.[19]

Other formulas for distinguishing between civil and criminal contempts suggest that if the contempt consists of passive non-compliance between parties or inaction regarding civil obligations resulting in private injury, the offense is civil.[20] Criminal contempt, however, consists of misbehavior obstructing the administration of justice.[21] Since criminal contempts are positive acts constituting interference with the law, they are considered to be public offenses.[22]

In addition to the civil-criminal classification, there is the direct-indirect classification.[23] Therefore, a civil or criminal contempt is of a direct or indirect nature. To be considered

[14] Gompers v. Bucks Stove & Range Co., note 12 *supra*.

[15] R. GOLDFARB, note 10 *supra* at 57.

[16] 80 F.2d 211 (2d Cir. 1935).

[17] FED. R. CRIM. P. 42(b) provides that if the judge has not certified that the contempt occurred in his presence and that he saw and heard the contempt, that the contempt shall be prosecuted on notice and hearing. See note 34 *infra* for a full statement of this rule.

[18] 330 U.S. 258 (1947).

[19] *Id.* at 303. The single act which was adjudged to be both criminal and civil contempt was the violation of a temporary restraining order by the union and its president.

[20] The passive non-compliance-positive obstruction distinction was suggested by S. RAPALJE, in TREATISE ON CONTEMPT, (1884). J. OSWALD, CONTEMPT OF COURT, (1911) suggested the distinction between civil obligations and interferences with the law.

[21] See Gompers, note 12 *supra* and People v. Gholson, 412 Ill. 294, 106 N.E.2d 333 (1952).

[22] *See* Bloom v. Illinois, 391 U.S. 194, 201 (1968).

[23] Illinois decisions recognizing this distinction, *e.g.*, People v. Harrison, 403 Ill. 302, 324, 86 N.E.2d 208, 210 (1949); People *ex rel.* Andrews v.

direct, the contempt must be an act committed "in the presence of the court or so near thereto as to obstruct the administration of justice. . . ."[24] Illinois cases have given a broad interpretation to this definition.[25] *People ex rel. Chicago Bar Association v. Barasch*[26] held that acts actually committed outside the presence of the judge but admitted in open court constituted direct contempt.[27] *People v. Parker*[28] stated that a contempt committed in any place set aside for the use of any constituent part of the court during its session is committed "in the presence of the court."[29] The mere filing with the clerk of a document containing contemptuous matter is contemptuous according to *People v. Howarth*.[30]

Indirect, or constructive, contempts consist of those acts of misbehavior committed outside the actual physical presence of the court.[31] Indirect contempts are often those committed by a publication which is distinct from the court geographically,

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Hassikis, 6 Ill. 2d 463, 466, 129 N.E.2d 9, 11 (1955).

[24] This language is found in 18 U.S.C. §401 (1964) which gives the United States Courts the power to punish such contempts. §401 does not designate whether this contempt is direct or indirect, however. See note 38 *infra*. Rule 42(a) of the Federal Rules of Criminal Procedure adopts similiar language, *i.e.*, "committed in the actual presence of the court," when outlining the procedure for summary punishment.

[25] People v. Sleezer, 8 Ill. App. 2d 130 N.E.2d 302 (1955) *aff'd*, 10 Ill. 2d 151, 139 N.E.2d 262 (1956) held that any conduct which tends to embarrass the court or obstruct it in the administration of justice is direct contempt. People v. Hagopian, 408 Ill. 618, 621, 97 N.E.2d 782 (1951) held that direct contempts are not limited to those acts committed in open court and within the "ocular" view of the judge.

For a case narrowly construing the direct, criminal contempt concept, see Farese v. United States, 209 F.2d 312 (1st Cir. 1954) wherein an attorney approached a witness and his wife in the hall of the courthouse and threatened them with harm if the witness turned state's evidence. The court held that 18 U.S.C. §401 (1964) (see note 38 *infra*) must be narrowly construed to bedrock cases where the concession of this summary power to the courts is necessary to enable them to preserve their authority and to insure maintenance of order and decorum in the courtroom.

[26] 406 Ill. 253, 94 N.E.2d 148 (1950).

[27] The alleged contempt here was practicing law without a license. The court distinguished indirect contempt from direct as one in which the whole or essential part of the act occurred out of the presence of the court. Therefore, proof and a hearing were required.

[28] 328 Ill. App. 46, 65 N.E.2d 457 (1946), *aff'd*, 396 Ill. 583, 72 N.E.2d 848, *aff'd*, 333 U.S. 571 (1948). Here, the party, a non-attorney, was ordered to produce documents but instead filed an affidavit containing scandalous charges against public officials, including the judge.

[29] *Id.* at 56, 65 N.E.2d at 462.

[30] 415 Ill. 499, 114 N.E.2d 785 (1953). The contemnors filed a petition requesting a special prosecutor in an embezzlement case. It contained defamatory language concerning a court official.

[31] *E.g.*, Nye v. United States, 313 U.S. 33 (1941) wherein the contemnors induced an administrator to take unwarranted actions in order to illegally terminate a wrongful death suit. The contemptuous behavior occurred more than one hundred miles from the court. In Nilva v. United States, 352 U.S. 385 (1957), the Court failed to mention the direct-indirect classification but treated the contempt as indirect because the contemnor was afforded a hearing. Here, the contemptuous act was the failure to produce sufficient documents under a subpoena *duces tecum*. Seemingly *contra* is Ohio v. Local 5760, USW, 172 Ohio St. 75, 173 N.E.2d 331 (1961) wherein

unless the publication causally affects the administration of justice. In such a case, the contempt is considered criminal.[32]

It is imperative that this direct-indirect distinction be made when the contempt is of a criminal rather than a civil nature. Rule 42(a) (b) of the Federal Rules of Criminal Procedure governs this situation. Rule 42(a), which applies to direct criminal contempts, states that if the judge certifies that he saw or heard the contempt and that it was actually committed in the presence of the court, then it *may* be dealt with summarily.[33] Rule 42(b) states that for those contempts not described in 42(a), the contemnor shall be accorded notice and a hearing, allowing adequate time to prepare a defense. It also provides that if this indirect contempt involves criticism of the judge, that judge is disqualified from sitting at the trial or hearing.[34] It is the type of contempt covered by 42(a) that is the subject of this comment.

Behavior Which Has Been Found to be Contemptuous on the Part of Counsel

Clashes between attorneys and judges are not a recent

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the act of contempt consisted of picketers preventing a sheriff from executing an order to take possession of trailers located on the picketed property. The trial court found the union guilty of direct contempt regardless of the fact that a state statute classified resistance to process as indirect contempt. Note, however, that the contemnors were afforded a hearing to determine the facts. The classification of this contempt as direct but the employment of a procedure used only in indirect contempts indicates the confusion involved in making this distinction.

[32] *E.g.*, McCann v. N.Y. Stock Exch., 80 F.2d 211 (2d Cir. 1935), where the defendant sued 600 parties alleging conspiracy under the anti-trust law. While the suit was pending, he sent a series of broadsides to all the parties in violation of a court order.

[33] FED. R. CRIM. P. 42(a) entitled "Summary Disposition" reads:

> A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

[34] FED. R. CRIM. P. 42(b) entitled "Disposition Upon Notice and Hearing" provides as follows:

> A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

See Cooke v. United States, 267 U.S. 517 (1925) as the forerunner of this rule. Cooke held that when the contempt consisted of a personal attack upon the judge, the judge *may* properly ask that another judge hear the matter. (Emphasis added) For the present status of this concept, see text at note 125 *infra*.

phenomena. The first notable case on record in the United States is the celebrated *Peck* case.[35] The alleged contempt by the lawyer in that incident consisted of publishing criticism of Judge Peck's opinion delivered in a case in which the lawyer appeared as counsel. As punishment, Judge Peck imprisoned and disbarred the lawyer.[36] This action resulted in impeachment proceedings against Judge Peck which failed by a senatorial vote of 22 to 21.[37] This case led to the passage, in 1831, of the first legislation curtailing the contempt power of judges.[38]

Congressman James Buchanan, a sponsor of the act, in protesting the procedure for punishing contempts against attorneys stated:

> Without either an information or an indictment, but merely a rule to show cause, drawn up in any form the judge may think proper, a man is put upon his trial for an infamous offence, involving in its punishment the loss both of liberty and property. He is deprived both of petit jury and grand jury, and is tried by an

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[35] W. STANSBURY, REPORT OF THE TRIAL OF JAMES PECK (1833).

[36] W. STANSBURY, note 35 *supra*. Today, the power of a federal court to punish an attorney for contempt is limited to punishment by fine or imprisonment. Phelan v. People of Guam, 394 F.2d 293 (9th Cir. 1968). However, such contempt proceeding may lead to a disbarment action in a state proceeding as is illustrated by Isserman v. Ethics Comm., 9 N.J. 269, 87 A.2d 903, *cert. denied*, 345 U.S. 927 (1953) wherein the Essex County Bar Association, through the Supreme Court of New Jersey, permanently disbarred Isserman as a result of the contempt citations he incurred in the case of Sacher v. United States, 343 U.S. 1 (1952). Justices Douglas and Black dissented when the Court denied certiorari, stating that the state had failed to afford Isserman an adequate hearing as required by due process. Isserman had been allowed to make oral argument and present a formal answer but was not allowed to offer evidence or confront the witnesses against him. The state court had rendered its decision on the basis of the citations as handed down by the federal judge which were given summarily, that is, without notice, hearing or jury trial.

[37] W. STANSBURY, REPORT OF THE TRIAL OF JAMES PECK (1833).

[38] A broad grant of power to the courts was given by the Judiciary Act of 1789, see note 6 *supra*. The occasions for the exercise thus conferred were left undefined. §1 of Act, March 2, 1831 curtailed the power as follows:

> That the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court, shall not be construed to extend to any cases except the misbehaviour of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehaviour of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts.

The present day equivalent to this power is 18 U.S.C. §401 (1964):

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as
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> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehaviour of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful order, rule, decree or command.

For a federal case advocating a narrow restriction of this power, see Farese v. United States, 209 F.2d 312 (1st Cir. 1954).

An attorney is not considered an officer of the court to whom §401(2) applies. Crammer v. United States, 350 U.S. 399 (1956).

> angry adversary prepared to sacrifice him and his rights on the altar of his own vengeance.[39]

Thus, the controversy concerning the type of procedure that should be employed in the punishment of contempt is not a new issue.

The type of behavior found to be directly and criminally contemptuous at the trial level will, by the nature of the offense, depend upon the facts of the situation and upon the sensibilities of the presiding judge. However, in examining the treatment of these contempt citations by appellate and supreme courts, certain trends emerge.

In most cases, an element of wilfullness or hostility must be evident in order for the contempt citation to be upheld. In *Phelan v. People of Guam,*[40] counsel commented on a court ruling foreclosing further questioning, stating that he was precluded from further cross-examination.[41] The trial judge found this remark to be contemptuous on the ground that the attorney's line of questioning would be repetitive.[42] The Court of Appeals for the Ninth Circuit set aside the contempt citation holding that the record showed no defiance or hostility nor an obstruction of the trial.[43] In *Raiden v. Superior Court for Los Angeles County,*[44] counsel's expression that a prior order of the court defeated the cause of justice was held not to constitute contempt because it could not be shown to be made in the absence of good faith.[45] In *Lewis v. Rice*[46] the court implied that an attorney could charge in good faith, without being contemptuous, that the judge was biased and prejudiced and would not afford a party a fair trial if the allegations of fact were couched in courteous and respectful language.[47] Here, however, because the motion to vacate contained scandalous and defamatory personal charges against the judge, it was contemptuous.[48]

Another instance in which a disrespectful remark was held not to be contemptuous occurred in *White v. State.*[49] Here, the attorney stated, "Well, regardless of the innermost thinking

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[39] Quote given as reported in Crammer v. United States, note 38 *supra.*
[40] 394 F.2d 293 (9th Cir. 1968).
[41] *Id.* at 294-5.
[42] *Id.* at 295.
[43] *Id* at 296. Here counsel merely defended in good faith the properness of his question. *Accord, In re* McConnell, 370 U.S. 230 (1962) which held that a lawyer, in protesting his client's case strenuously and persistently, cannot be held in contempt so long as he does not cause an obstruction which interferes with the judge's performance of his judicial duty.
[44] 34 Cal. 2d 83, 206 P.2d 1081 (1949).
[45] *Id.* at 87, 206 P.2d at 1083.
[46] 261 S.W.2d 804 (1953).
[47] *Id.* at 805.
[48] *Id.*
[49] 218 Ga. 290, 127 S.E.2d 668 (1962).

Sir, outside I have tried to maintain respect for this court, Sir."[50] This remark grew out of a disagreement as to the soundness of a certain legal prosecution. The Supreme Court of Georgia held that the contempt citation was an abuse of the trial judge's discretion because he knew of counsel's ill health and because the case by its nature was charged with emotion.[51] The decision also rested on the fact that in spite of the disrespect that the attorney may have felt toward the judge, he was amenable to the court in his outward manifestations, particularly in his use of courteous language. A case which goes a step further is *Gallagher v. Municipal Court of Los Angeles.*[52] Here, the attorney urged an untenable position. Judge Traynor, in a California Supreme Court decision, held that this was within an attorney's rights so long as he did not resort to deceit or wilful obstruction of orderly process.[53] The case presented a fact issue as to whether or not the attorney's conduct was actually contemptuous. The record, according to the Supreme Court, failed to reveal improper conduct.[54] The contempt citation merely recited that the attorney was insolent and boisterous.[55] The court held that in a situation such as this, if the attorney subjects the judge to ridicule and insult by intonations or gestures which accompany words which the record reveal to be wholly innocuous, the attorney should be warned that such conduct is offensive before being held in contempt.[56]

In *MacInnis v. United States,*[57] the remarks, "You should cite yourself for misconduct," and "You ought to be ashamed of yourself,"[58] were upheld by the Court of Appeals for the Ninth Circuit as contemptuous. These remarks grew out of a disagreement between judge and counsel over a ruling. In upholding the trial court's ruling that the statements were contemptuous "per se," the court stated that a disagreement of this nature gives no

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[50] *Id.* at 292, 127 S.E.2d at 670.

[51] *Id.* at 298, 127 S.E.2d at 673. The case was a child custody hearing in which counsel stated that he hoped to avoid getting the judge's "dander up."

[52] 31 Cal. 2d 784, 192 P.2d 905 (1948). Here the attorney attempted to take part in the investigation of his client's reported attempt to bribe jurors. The Supreme Court of California stated that not allowing this participation was within the lower court's discretion but that a mistaken act of counsel prior to that determination was not contemptuous.

[53] *Id.* at 795, 192 P.2d at 913.

[54] *Id.* at 794, 192 P.2d at 912.

[55] *Id.* Because of the right to appeal a contempt conviction, the certificate of contempt must set forth a written order giving the facts. People v. Loughran, 2 Ill. 2d 258, 118 N.E.2d 310 (1954). A recitation of conclusions without sufficient facts upon which they rest makes appellate review impossible. Great Lakes Screw Corp. v. N.L.R.B., 409 F.2d 375 (7th Cir. 1969). *Accord,* Gallagher v. Muncipal Court, note 52 *supra.* For an example of a deficient certificate, see Tauber v. Gordon, 350 F.2d 843 (3rd Cir. 1965).

[56] *Id.* at 796, 192 P.2d at 913.

[57] 191 F.2d 157 (9th Cir. 1951).

[58] *Id.* at 159-60.

right to flagrant and open defiance of the court's authority.[59]

However, a similar remark, *i.e.*, "I think your bias is showing" was not upheld as contemptuous by the Illinois Appellate Court.[60] As the basis of its decision, the court took notice that the trial judge acted intemperately by terminating a line of questioning and characterizing the questions as ridiculous when in fact they were proper. The judge also foreclosed questions which were not objected to by the opposing counsel.[61] In *Schlesinger Petition*,[62] where the judge repeatedly asked counsel if he was a Communist, the Supreme Court of Pennsylvania held that an attorney's reaction to the intemperate actions of the judge could not be held contemptuous.[63] In *Offutt v. United States*,[64] the Supreme Court developed the same line of reasoning. Here the judge became personally embroiled with defense counsel.[65] In reversing the citation, the Court stated that although the actions of the attorney may have been reprehensible, they could not be considered apart from the actions of the trial judge.[66]

In re McConnell[67] and *Hallinan v. United States*[68] implied that if counsel persists in the course of behavior which has been repeatedly admonished against by the court, this conduct is a wilful obstruction of justice.[69] In *McConnell*, counsel violated an order to discontinue an offer of proof. The Supreme Court held that this action did not exceed the line of duty if done in good

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[59] *Id.* at 159.

[60] People v. Pearson, 98 Ill. App. 2d 203, 211, 240 N.E.2d 337, 341 (1968).

[61] *Id.* at 212, 240 N.E.2d at 341.

[62] 367 Pa. 476, 81 A.2d 316 (1951).

[63] *Id.* at 482, 81 A.2d at 317. The action here was one for trespass. The judge asked counsel if he had used his office to harbor a Communist front organization and other similar questions. Counsel's alleged contempt was the refusal to answer and the asking of the judge to disqualify himself. The Supreme Court, in reversing quoted from *Ex parte* Senior, 37 Fla. 1, 15, 19 So. 652, 653 (1896) which held:

> It can not certainly be true that the decision of an inferior court adjudging the matter to be contempt precludes all investigation as to the legality or proper authority of the court to make such order.

[64] 348 U.S. 11 (1954). The lower court case involved the prosecution of an abortionist who Offutt was defending. Peckham v. United States, 210 F.2d 693 (D.C. Cir. 1953).

[65] A few examples of the responses of the judge illustrate the point. When Mr. Offutt stated that he misunderstood a court ruling, the judge replied, "You can't be as stupid as all that." On another occasion the judge replied to Mr. Offutt, "Just a moment. If you say another word, I will have the Marshall stick a gag in your mouth." Peckham v. United States, note 64 *supra* at 704.

[66] 348 U.S. 11 (1954). In reaching this conclusion, the court took note of the record and stated that the judge's behavior was not:

> . . . a rare flareup, not a show of evanescent irritation — a modicum of quick temper . . . allowed even judges. . . . His behavior precluded that atmosphere of austerity which should especially dominate a criminal trial and which is indispensable for an appropriate sense of responsibility on the part of court, counsel, and jury.

Id. at 17.

[67] 370 U.S. 230 (1962).

[68] 182 F.2d 880 (9th Cir. 1950).

[69] 370 U.S. 230, 236 (1962); 182 F.2d 880, 887 (9th Cir. 1950).

faith,[70] but implied that a continuance in the line of conduct after repeated warnings negates any presumption of good faith. In *Hallinan* the attorney repeatedly included improper subject matter in his opening statement after several admonitions from the judge. This action was held to be a wilful obstruction, showing a deliberate design to ignore the ruling of the court and to get the excluded matter before the jury.[71]

In *State v. Caffrey*,[72] counsel made a remark which he claimed to be a Shakespearean aside, not intended for the ears of the judge. The facts were that the court asked counsel to be seated after he addressed the court in a loud, insulting manner. Counsel replied, "It won't be necessary, Your Honor, I'm getting out of this court, if you can call it a court."[73] The last part of this statement was not intended to be heard by the judge. The Supreme Court of Washington held this remark to be even more contemptuous than if it were intended to be heard.[74] According to *Parmelee Transportation Co. v. Keeshin*,[75] where counsel remarked, "That is crazy" in response to a ruling, if the comment is intended for the ears of co-counsel and there is no evidence that the judge heard it at the time of its making, the conduct will not be upheld as contemptuous, in spite of the fact that it was made in the presence and within the hearing of the jury.[76]

Analysis of the above cases indicates two major generalizations. First, statements which, although viewed by the trial judge as contemptuous, if made in good faith, without defiance or a wilful design to obstruct justice, will not be upheld as contemptuous. Second, conduct on the part of counsel, regardless of its reprehensible nature, cannot be viewed separately from that of the trial judge.[77]

The Nature of the Summary Procedure

When an attorney is cited for contempt, the citation and sentencing usually occur at either of two times: directly and immediately after the contumacious remark or action is committed, or at the end of the trial. If the act of contempt is of an isolated nature, occurring in an otherwise orderly trial, the citation usually is made immediately or within a short time after the incident.[78] The timing of the citation is not regulated by statute in the federal courts and is left in the discretion of the

[70] 370 U.S. 230, 236 (1962).

[71] The behavior objected to took two forms. First, Mr. Hallinan anticipated the identity of 125 government witnesses in his opening statement and proceeded in a wholesale attack of their credibility. In doing so, he anticipated much of the government's case, indulging in speculation. Secondly, he continued in a cross-examination of a witness after being admonished against doing so.

[72] 70 Wash. 2d 120, 422 P.2d 307 (1966).

[73] *Id.* at 121, 422 P.2d at 308. Counsel's brief presented an issue of

judge.[79] In the rare case of a disruptive course of conduct which continues throughout the entire trial, judges have waited until the jury has returned its verdict and been dismissed and then have cited and sentenced the contumacious attorney. This is a procedure followed in the only cases of this type: the Conspiracy Trial[80] and *Sacher v. United States*.[81]

Contemnors invariably insist that the meaning to be given to the word "summary" refers to the timing of the punishment.[82] The argument is made that if the court waits until overnight or until the end of the trial to punish the contempt, the proceeding has lost its summary nature and should be tried under Rule 42(b) of the Federal Rules of Criminal Procedure, which provides for notice and hearing.[83] The argument has been supported by some Supreme Court Justices in dissenting opinions who have added that Rule 42(a) not only permits but requires instant exercise

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fact as to the manner in which the words were spoken. Counsel contended that he spoke them softly whereas the citation stated that they were spoken in a "loud, angry, insulting . . . manner." The court quoted State v. Zioncheck, 171 Wash. 388, 394, 18 P.2d 35, 37 (1933) which stated :

> [M]uch depends upon the manner, expression, and attitude of the party adjudged in contempt in addressing the court. . . . A finding of contempt is not necessarily based alone upon the language used. The contempt may largely exist in the manner in which the words are spoken. . . .

[74] 70 Wash. 2d 120, 122, 422 P.2d 307, 308 (1966).

[75] 292 F.2d 806 (7th Cir. 1961).

[76] *Id.* at 808.

[77] Two minor conclusions are also possible:

(1) That a protestation of a non-personal nature which is couched in courteous language will not be upheld as contemptuous.

(2) That to be obstructive, the remark must actually be heard by the court and there should be a record of it.

[78] In Alexander v. Sharpe, 245 A.2d 279 (1968), the judge cited and sentenced the attorney the next day. In State v. Caffrey, 70 Wash. 2d 120, 422 P.2d 307 (1966) and *In re* Gates, 248 A.2d 671 (D.C. 1968), the citing and sentencing occurred immediately.

[79] See the statement of FED. R. CRIM. P. 42(a) (b) at notes 33 and 34 *supra*. *See also* Sacher v. United States, 343 U.S. 1, 10 (1952). However, this discretion has been limited upon occasion as in Parmelee Trans. Co. v. Keeshin, 292 F.2d 806 (7th Cir. 1961) wherein the attorney at one point in the trial used the term "sardonic" to characterize a ruling of the judge. Five months later, the judge learned the meaning of the term and then entered the citation on that particular point. This act was struck down by the court of appeals.

That the procedure employed by trial judges has not been uniform is acknowledged by the Court in *Sacher supra* at 7.

[80] No. 69 CR 180 (N.D. Ill., filed Feb. 15, 1970), *appeal docketed*, No. 1-8294, 7th Cir., Feb. 26, 1970.

[81] 343 U.S. 1 (1952).

[82] *Id.* at 9. This point was elevated to a jurisdictional level by the accused in MacInnis v. United States, 191 F.2d 157 (1951) wherein the court waited until the next day after the contumacious remark occurred for the citation and sentenced the attorney at the trial's end. The contemnor contended that by not citing and sentencing the contemnor immediately, the court lost its jurisdiction to punish summarily. The court held that the jurisdiction attached immediately upon the commission of the contempt and was not surrendered by waiting until the next day. It stated that immediate vindication of the dignity of the court means speedy vindication but does not require steps which would disrupt the trial.

[83] Sacher v. United States, note 81 *supra* at 7 where the contemnors based this contention upon two arguments:

because if the emergency is survived, the need for summary punishment no longer exists.[84]

Courts have not agreed with this interpretation, however, and hold that "summary" refers to the type of procedure employed rather than to the timing of the procedure.[85] This procedure is one which dispenses with the formality, delay and digression that would result from issuance of process, service of complaint and answer, holding hearings . . . and all that goes with a conventional court trial.[86] The contention is that the reason for a conventional trial is to determine the facts. Because the events have occurred within the view of the judge, the need for this procedure is dispensed with.[87]

The Supreme Court in *Sacher* stated that no possible prejudice against contemnors could occur by waiting until the end of the trial, and, in fact, an immediate punishment could prejudice the contemnor during the trial in the eyes of the jury.[88] The *Sacher* Court also stated that a mid-trial citation would be obstructive to a smooth running proceeding particularly because of the need for substitution of counsel.[89] The Court stated that a short delay is laudable so as to insure that any punishment is not meted out in the heat of the moment.[90] Because the integrity and efficiency of the administration of the proceeding are the greatest considerations, the moment when the citations are declared should be left in the discretion of the judge.[91]

One criticism of the procedure of waiting until the end of the trial for citation of the attorney is that it is possible that he may be engaging in conduct which the trial court regards as contumacious without knowledge that it is so regarded. In *Hallinan*[92] and *MacInnis*,[93] the trial court employed a hybrid procedure which eliminates this problem. Here the judges cited the attor-

(1) That since the trial judge waited until the trial's end, no possible obstruction could occur and therefore, no need for summary punishment existed.

(2) That because a portion of the citation contained a charge of conspiracy to disrupt the trial and because the judge could not have heard any such argument, the contemnors were entitled to notice and hearing before an impartial judge.

This first contention is supported by State v. Treon, 188 N.E.2d 308 (Ohio App. 1963) wherein the court held that to constitute direct contempt, the misbehavior must require immediate punishment to preserve the court's authority.

[84] See the dissenting opinions of Justices Black and Frankfurter in *Sacher*, 343 U.S. 1, 14, 23 (1952).

[85] Sacher v. United States, 343 U.S. 1, 9 (1952).

[86] *Id.*

[87] *Id.*

[88] *Id.* at 10.

[89] *Id.*

[90] *Id.* at 41.

[91] *Id.* at 11.

[92] 182 F. 2d 880 (9th Cir. 1950).

[93] 191 F.2d 157 (9th Cir. 1951).

neys for contempt during the trial, thereby informing them that their conduct was regarded as obstructive, but waited until the end of the trial for sentencing. The trials proceeded without disruption in spite of the citations because the attorneys involved were allowed to continue the defense of their clients. This type of proceeding has been approved by Mr. Justice Frankfurter in his dissenting opinion in *Sacher*.[94]

History and Rationale of the Summary Punishment of Contempt

Since the reign of Edward I, it has been established that the courts have the power to punish contempt committed in open court.[95] From the founding of the United States, the constitutionality of this power has been little doubted.[96] Congress provided for it in the act creating the federal courts.[97] When abuses under this power have manifested themselves, Congress, in corrective legislation, has concerned itself with defining situations when the power can be properly exercised and with procedures for its use, but has not denied its existence.[98] However, Justice Black has stated that:

> [t]he early precedents which laid the groundwork for this line of authorities were decided before the actual history of the procedures used to punish contempt was brought to light, at a time when 'wholly unfounded assumptions about 'immemorial usuage' acquired a factitious authority and were made the basis of legal decision.'[99]

He contends that the cases which have adherred to the summary power without question have

> erroneously assumed that courts have always possessed the power . . . and that it inhered in their very being without supporting their suppositions by authority or reason. Later cases merely cite the earlier ones in a progressive cumulation while uncritically repeating their assumptions about 'immemorial usage" and "inherent necessity."[100]

Recent scholarship has exploded the myth of immemorial

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[94] 343 U.S. 1, 40-41 (1952).

[95] Beale, *Contempt of Court, Criminal and Civil*, 21 HARV. L. REV. 161 (1908).

[96] See Mr. Justice Frankfurter's discussion and the Court's footnote in Green v. United States, 356 U.S. 165, 190-91 (1958) wherein he cites 42 Supreme Court cases which have upheld this power.

[97] See note 6 *supra*.

[98] *E.g.*, 18 U.S.C. §3285 (1964) which is the federal statute of limitations stating that no proceeding for criminal contempt shall be instituted unless begun one year after the date of the act complained of.

42 U.S.C. §1995 (1964) which limits the fine on a natural person violating the Civil Rights Act to $1,000 and the imprisonment to six months. The right to a jury trial is within the discretion of the judge but if the conviction occurs in a non-jury trial, the fine is limited to $300 and the imprisonment to 45 days.

[99] 356 U.S. 165, 196 (1958) wherein the Court quoted from Frankfurter and Landis, *Power to Regulate Contempts*, 37 HARV. L. REV. 1010, 1011 (1924).

[100] 356 U.S. 165, 196 (1958).

usage.[101] Until the late seventeenth or early eighteenth century, the English courts, with the exception of the Court of Star Chamber, did not have the power of summary punishment. Prior contempts were tried in the normal course of criminal law, including a jury trial.[102] After the Star Chamber was abolished, this summary power crept into the common law courts. In 1765, Justice Wilmot declared in an undelivered opinion in *The King v. Almon* that the courts had exercised the power to try all contempts summarily since their creation. This much quoted opinion was never actually handed down and was published only after his death. Wilmot's thesis has been accepted by American courts with little dissent[103] but with the *Peck* case, its abuses were early recognized.[104]

The rationale behind this power is twofold. First, some immediate means to discipline the offender is needed in order to preserve the dignity and authority of the court.[105] This means of discipline is necessary to maintain courtroom control and thus the protection of our institutions.[106] Second, where the judge has personally observed the contemnor's misbehavior, the usual mode of proof and need for a trier of fact is unnecessary.[107] However, this concept has not been blindly accepted[108] and the minority

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[101] Frankfurter and Landis, *Power to Regulate Contempts*, note 99 *supra*.

[102] Beale, *Contempt of Court, Criminal and Civil*, 21 HARV. L. REV. 161 (1908).

[103] See Mr. Justice Frankfurter's discussion and the Court's footnote in Green v. United States, 356 U.S. 165, 190-91 (1958) wherein he cites 42 Supreme Court cases which have not questioned this power.

[104] See text at note 35 *supra*.

The contemnors in the *Sacher* case urged that unreasonable use of this power as applied to lawyers would have an intimidating effect upon the profession, discouraging lawyers from defending those accused of offenses of a political nature against the government. (Defendants in the proceeding out of which the contempt citations arose were accused of being Communists.)

[105] Commonwealth v. Langnes, 434 Pa. 478, 255 A.2d 131 (1969) which stated that the court had an inherent power to protect itself against insult and abuse.

[106] Bloom v. Illinois, 391 U.S. 194, 201 (1968).

[107] 343 U.S. 1, 9 (1952). *Jury Trial for Criminal Contempts: Restoring Criminal Contempts Power and Protecting Defendants' Rights*, 65 YALE L.J. 846 (1956) suggests four benefits to the administration of justice afforded by summary punishment which would be non-existent if contempt were prosecuted in the customary manner:

(1) Speed of prosecution and punishment which may be necessary to continue the principal proceedings.

(2) Avoidance of delays in the judicial process:

(a) Many criminal contempts must be resolved to adjudicate the matters in the principal case.

(b) If the contempts were not prosecuted by the judges themselves, they would be called away from their judicial duties to serve as witnesses.

(3) Increased deterence of contemptuous conduct.

(4) The threat of summary punishment promotes the dignity of the courts because it is a means for securing respect and obedience.

[108] Mr. Justice Black's dissent in *Sacher*, 343 U.S. 1, 14 (1952) wherein he states that the judge should not pass on the charges he has made and that the contemnors were entitled to a jury trial with an opportunity to defend themselves. See Mr. Justice Frankfurter's dissent in the same case. In Green v. United States, 356 U.S. 165 (1958), a 5-4 decision, the dissenters

opinion became the majority opinion in *Bloom v. Illinois.*[109] Here, the Court re-examined three recent cases holding that criminal contempts could be constitutionally tried without a jury. The Court held that criminal contempt is in every essential respect a serious crime.[110] In reaching this conclusion, the Court stated that a crime in the ordinary sense is a violation of the law, a public wrong, and punishable by fine or imprisonment.[111] Even when contempt is not a violation of a specific criminal law, the conviction is still to be considered criminal because the impact upon the defendant is the same, *i.e.*, fine and/or imprisonment.[112] The function of the criminal contempt conviction is the same as for other crimes, that is, to protect our institutions of government and enforce their mandates.[113]

After determining that criminal contempt is a crime, the *Bloom* Court examined whether or not it is the type to which the jury trial provisions of the Constitution apply. Here, the Court accepted its reasoning in *Cheff v. Schnackenberg,*[114] and *United States v. Barnett,*[115] which held that criminal contempt is a petty offense unless the punishment makes it a serious one. *Bloom* held that aside from the penalty imposed, criminal contempt is not intrinsically considered a serious offense requiring the protection of the constitutional guarantee of the right to trial by jury.[116] However, because of the considerations which make the right to trial by jury fundamental in criminal cases, there is substantially no difference between serious contempts and other serious crimes.[117] In contempt cases, there is a compelling argument in favor of the right to jury trial as a protection against the arbitrary exercise of official power. Contemptuous conduct often strikes at the judge's most vulnerable and human qualities. Even when the contempt is not personally directed at the judge, it often represents a refraction of judicial authority or an inter-

were unanimous in stating that the contemnor had a right to a jury trial.

[109] 391 U.S. 194 (1968). The incident out of which this criminal contempt arose was the willful petitioning to probate of a falsely prepared will. The contemnor, an attorney, was sentenced to a two-year prison term.

[110] 391 U.S. 194, 201 (1968).

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] 384 U.S. 373 (1966).

[115] 376 U.S. 681 (1964).

[116] 391 U.S. 194, 198 (1968). For a discussion of contempt as a petty offense, with emphasis upon the *Cheff* and *Barnett* cases, see *Constitutional Law: The Supreme Court Constructs a Limited Right to Trial by Jury for Federal Criminal Contemnors,* 1967 DUKE L.J. 632 (1967).

[117] 391 U.S. 194, 202 (1968). The Court has recognized several procedures which are or should be afforded the accused in both an ordinary criminal case and in a criminal contempt proceeding:

(1) The presumption of innocence. *Bloom supra* at 205.

(2) The privilege against testifying against oneself. *Accord,* State v. Treon, 188 N.E.2d 308 (Ohio App. 1963).

(3) The right to a public trial before an impartial tribunal. *Bloom*

ference with the judicial process.[118] The Court, after examining the history of the contempt power in the United States with attention to its abuses, stated that this history demonstrates the lack of wisdom of vesting the judiciary with completely untrammeled power to punish contempt and makes clear the need for effective safeguards against that power's abuse.[119]

The Court weighed the importance of the role which contempt prosecutions play in the proper functioning of the judicial system against the need to protect the accused against abuses. The second interest outweighs the first and therefore a right to jury trial in serious contempt cases is imperative.[120] Convictions for contempt often result in serious penalties that are indistinguishable from those obtained under ordinary laws. Therefore, the right to jury trial which is fundamental in criminal cases must be extended to criminal contempts.[121]

Finally, the Court addressed itself to the question of when a contempt will be considered serious enough to warrant a jury trial. It stated that when the legislature has not expressed a judgment as to the seriousness of the offense by fixing a maximum penalty, the sentence actually imposed is the determining factor.[122] Bloom was sentenced to a two-year imprisonment, which could not be considered a petty offense.[123] The federal statute sets the line between serious and petty offenses at a term of six months imprisonment.[124] Therefore, under the *Bloom* mandate, no contemnor, regardless of the direct nature of his criminal contempt, may be imprisoned for a term of more than six months without a jury trial.

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supra at 205.

(4) The right to confront witnesses against the accused. Nilva v. United States, 352 U.S. 385 (1957).

(5) The burden of proof must be proof beyond a reasonable doubt. *Nilva supra* at 399.

The Nilva case, a 5-4 decision, involved an attorney who, as vice-president of a corporation, failed to produce documents under a subpoena *duces tecum*. He was allowed a hearing and found guilty of indirect, criminal contempt. The Court sustained the conviction. The four dissenting justices held that the charges should have been tried before a different judge.

[118] Bloom v. Illinois, 391 U.S. 194, 202 (1968).

[119] *Id.* at 210.

[120] *Id.* at 208-09.

[121] *Id.* at 209.

[122] *Id.* at 211.

[123] *Id.*

[124] 18 U.S.C. §1 (1964) entitled "Offenses Classified" states, "Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense."

18 U.S.C. §402 (1964) entitled "Contempts Constituting Crimes" states: ". . . [B]ut in no case shall the fine . . . exceed . . . $1,000 . . . nor shall such imprisonment exceed the term of six months. . . ." However, the next paragraph states, "This section shall not be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice. . . ."

See Note, *Constitutional Law: The Supreme Court Constructs a Limited Right to Trial by Jury for Federal Criminal Contemnors*, 1967 DUKE L.J.

A second Supreme Court case, *Offutt v. United States,* [125] imports another major safeguard to the rights of the contemnor. In *Offutt,* the trial judge of a federal court became personally embroiled in protracted wrangling with the defense attorney. The Court expanded a concept previously mentioned in *Cooke v. United States,*[126] which held that in such a situation, the judge *may* properly request another judge to hear the contempt proceedings.[127] *Offutt* held that "the judge who imposed the sentence herein *should* invite the Chief Judge of the District Court to assign another judge to sit in the second hearing . . . ."[128] In the *Offutt* fact situation, the contempt was that of an attorney in open court; that is, it was of a direct, criminal nature punishable under 42(a) of the Federal Rules of Criminal Procedure. If *Offutt* is to be applied to its fullest extent, a contemnor has a right to a hearing with an impartial judge if the case was such that the original judge became personally involved, regardless of the procedure provided for by (42(a).[129] Only 42(b) recognizes this right and applies it only to cases of indirect criminal contempt.[130]

The Court in *Offutt* did not, however, rely upon the due process clause of the Constitution in its discussion of the right to an impartial tribunal as did the *Bloom* Court with the right to jury trial. Pursuant to its supervisory authority over federal courts, it set aside the conviction and remanded the cause to the district court with directions for the case to be tried under a different judge.[131]

The mandates of the *Offutt* and *Bloom* cases have been to a large extent circumvented by the lower courts through the use

632. Footnote 84 at 654 suggests that over half the states limit the punishment of contempt to one year or less.

[125] 348 U.S. 11 (1954).

[126] 267 U.S. 517 (1925).

[127] See note 34 *supra.*

[128] 348 U.S. 11, 18 (1954).

[129] Kasson v. Huges, 390 F.2d 183 (3rd Cir. 1968). The *Offutt* decision would also contradict the second paragraph of 18 U.S.C. §402 (1964) as stated in note 124 *supra.*

[130] Note 34 *supra.* There is no statute governing disqualification of judges at the federal appellate level. 28 U.S.C. §25 (1964) provides for disqualification for bias or prejudice for federal district court judges. Berger v. United States, 255 U.S. 22 (1921) held that when the affidavit of the party requesting a change of judge is filed, the judge in question should not pass upon the truth or falsity of the charges but may pass on the sufficiency of the affidavit itself. The courts have given a very narrow construction to the term "bias." Craven v. United States, 22 F.2d 605 (1st Cir. 1927); Johnson v. United States, 35 F.2d 355 (W.D. Wash. 1929). See *Disqualification of Judges,* 56 YALE L.J. 605 (1947) and *Criminal Procedure — Contempt — Extent of Power of Trial Judge to Punish Summarily,* 8 VAND. L. REV. 643 (1955).

[131] 348 U.S. 11, 18. *See* D. Weissman, *Sacher and Isserman in the Courts: Note III,* 15 L. GUILD REV. 67 (1955) and *Criminal Law — Contempt — Judge-Attorney Relationship,* 9 RUTGERS L. REV. 760 (1955) for discussion stating that *Offutt* in effect embodied the three man dissent in *Sacher* therefore reversing it.

of various procedures. *Bloom* can be avoided by classifying each disruptive act separately and then imposing a distinct sentence of less than six months for each act. In this manner, contemnors accumulate a period of imprisonment beyond the six month requirement of *Bloom* without being afforded a jury trial.[132] The rationale supporting the use of this procedure is that to allow concurrent sentences or to classify separate acts as one single contempt would diminish the deterrent effect of the contempt citation and allow the contemnor to continue his disruptive course of conduct safe with the knowledge that his maximum sentence without a jury trial would be six months. To allow this would negate the purpose of the contempt citation, which is to maintain order in the courtroom.[133]

Another difficulty posed by *Bloom* involves the determination of the seriousness of the contempt which must be decided *before* the right to a jury trial arises. *Bloom* states that the seriousness of the contempt, in the absence of a statute, will be determined by the sentence actually imposed.[134] Therefore, in order to determine whether or not the defendant is entitled to a jury trial, the judge, in effect, must determine his guilt. This practice is contrary to the fundamental concept of criminal justice that a defendant is innocent until proven guilty. In addition, if the court has prejudged the case in order to give the accused the right to trial by jury, it is possible that the court's impartiality is subject to question.

The primary weakness of the *Offutt* decision is that the judge whose prejudice is in question is the one who determines his own impartiality.[135] However, by the use of the word "should" in the phrase ". . . should invite another judge . . ." the Court implies a strong mandate. It has been proposed that those individuals who are the most biased fancy themselves as the

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[132] *E.g.*, Mayberry Appeal, 434 Pa. 478, 255 A.2d 131 (1969); United States v. Dellinger, note 1 *supra* wherein Mr. Kunstler was found guilty of 24 separate acts of contempt with sentences ranging from seven days to six months with the total time of imprisonment because of consecutive sentencing being four years, 13 days. In Yates v. United States, 350 U.S. 860 (1955), the defendant in a Communist Conspiracy trial under the Smith Act took the stand and refused to answer 11 separate questions about her associations. This was held to be 11 separate contempts with one year sentences for each contempt to be served concurrently. *Contra*, United States v. Orman, 207 F.2d 148, 160 (3rd Cir. 1953); United States v. Emspak, 95 F. Supp. 1012 (D.D.C. 1951); United States v. Yukio Abe, 95 F. Supp. 991 (D. Hawaii 1950); United States v. Costello, 198 F.2d 200 (2d Cir. 1952), *cert. denied*, 344 U.S. 874 (1952).

[133] *Mayberry Appeal*, note 132 *supra* at 484, 255 A.2d at 135. See, however, the dissent in the same case stating that a more realistic view would be to treat the conduct of the contemnor throughout the trial as one contempt.

[134] 391 U.S. 194, 211 (1968).

[135] "Fairness of course requires an absence of actual bias." *In re* Murchison, 349 U.S. 133, 136 (1955); No man should judge his own cause. Tumey v. Ohio, 273 U.S. 510, 522 (1927).

most impartial.[136] Under this method of choosing tribunals a large number of appeals is likely.

The importance of an impartial tribunal in a contempt proceeding has been recognized in other cases.[137] In his dissenting opinion in *Sacher*, a criminal contempt in open court, Justice Frankfurter said:

> The particular circumstances of this case compel me to conclude that the trial judge should not have combined in himself the functions of accuser and judge. For his accusations were not impersonal . . . . Whatever occasion may have existed during the trial for sitting in judgment upon claims of personal victimization, it ceased after the trial had terminated . . . .
>
> All grants of power, including the verbally unlimited terms of Rule 42(a) of the Rules of Criminal Procedure, are subject to the inherent limitation that the power shall be fairly used for the purpose for which it is conferred . . . . The rule merely permits summary punishment. It does not command summary punishment of all contempts "committed in the actual presence of the court," in all circumstances and at any time.[138]

Frankfurter suggested that even in a case of protracted wrangling, as in *Sacher*, summary measures are not necessary to enable the trial to continue.[139] But if they are to be instituted, the use of a procedure suggested by the courts in *Hallinan*[140] and *MacInnis*[141] would be preferable to awaiting the end of the trial for citation and sentencing as was done in *Sacher* and upheld by the majority of the Supreme Court.[142]

As Rule 42(a) (b) stands at the moment, it does not provide for a hearing by an impartial tribunal when the contempt involves the judge personally unless the contempt is of an indirect or constructive nature.[143] This does not provide for the fact

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For examples where judges were held not to have abused this discretion, see Cross Co. v. Local 155 UAW, 377 Mich. 202, 139 N.W.2d 694 (1966); Nilva v. United States, 352 U.S. 385 (1957); Ungar v. Sarafite, 376 U.S. 575, 592 (1964).

See Note and Comment, *Courts: Contempt: Trial of Contemnor by Contemned Judge*, 21 CORN. L.Q. 313 (1936) which explains that the judge is not trying his own cause because the offense is against the state and society.

[136] *See* Sacher v. United States, 343 U.S. 1, 12 (1952).

[137] See the dissents in Nilva v. United States, 352 U.S. 385 (1957) and in Ungar v. Sarafite, 376 U.S. 575, 592 (1964) where Justice Douglas seeks to elevate the right to an impartial tribunal in a criminal contempt case to a Constitutional right as required by due process standards.

[138] 343 U.S. 1, 28-29 (1952).

[139] *Id.* at 40. Justice Frankfurter rejected the government contention that if there was a hearing before another judge, this would give the contemnor an added opportunity to harass the judge and that to allow the judge to be cross-examined would cause damaging controversy. He stated that such a contention depreciates the status of federal judges. Respect for the judiciary would better be served by exacting high standards of judicial competence rather than by asserting a power which violates due process. *See* Pancio v. United States, 412 F.2d 1151 (2d Cir. 1969).

[140] 182 F.2d 880 (9th Cir. 1950).

[141] 191 F.2d 157 (9th Cir. 1951).

[142] 343 U.S. 1-14 (1952).

[143] Note 34 *supra.*

that most cases involving direct contempt in the open courtroom will involve "disrespect or criticism" of the judge.[144] This defect has been remedied to some extent by the *Offutt* decision.[145] Another case has gone so far as to criticize 42(b) for failing to provide for an impartial tribunal in situations other than those involving disrespect to the judge.[146]

Conclusion

Rule 42(a)(b) grants unfettered power to the courts to punish direct, criminal contempts. The abuses of this power have been recognized by the *Bloom* and *Offutt* Courts. Yet the mandates of these cases which grant to the contemnor the basic procedural protection of a jury trial presided over by an impartial judge have been largely ignored or circumvented by the lower courts. Rule 42 is no longer the codification of the case law which it was when it was adopted in 1946. Because of the growing number of trials involving defendants who challenge the judicial system and counsel who must defend them under that system, this rule should be revised so as to define a procedure that would guarantee the contemnor his rights as already recognized by the Supreme Court.

It is suggested that the procedure should include provisions such as the following:

(1) Counsel should be cited for each contemptuous act immediately after its occurrence.

(2) Upon conclusion of the trial, an impartial judge should review the record and impose the sentence.

(3) If the sentences are to be served consecutively, and the total time of imprisonment exceeds six months, or if a single sentence exceeds six months, a jury trial should be afforded the contemnor.

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[144] Sacher v. United States, 343 U.S. 1, 12 (1952).
[145] See text at note 125 *supra*.
[146] Nilva v. United States, 352 U.S. 385, 404 (1957).